No. 84-495

IN THE

Supreme Court of the United States

October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM J. DAVIS, LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC.

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Statement of Interest of *Amicus Curiae*

The National Family Planning and Reproductive Health Association, Inc. is a broad-based coalition of family planning providers and consumers working together to enhance the delivery of family planning services throughout the United States. Committed to the concept of reproductive freedom for all Americans, NFPHRA seeks to ensure that adults and adolescents alike obtain relevant information and medically necessary clinical services pertaining to family planning and reproductive health care, *inter alia*, abortion. Validation of the Pennsylvania Abortion Control Act would significantly limit reproductive freedoms and the availability of proper clinical services.

TABLE OF CONTENTS.

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Summary of the Argument

The Court of Appeals for the Third Circuit properly struck down those provisions of the Pennsylvania Abortion Control Act addressed to informed consent and post-viability abortions. In addition, the Court of Appeals properly enjoined the operation of the parental consent provisions.

Section 3205(a) impermissibly intrudes into the physician-patient relationship, by mandating that a *physician* supply each woman desirous of an abortion specified information. As the "physician-only" requirement is not severable, Section 3205(a)(1) is unconstitutional in its entirety. Section 3205(a)(2) is also unconstitutional, in that it requires that each woman be provided with an opportunity to review additional information immaterial to rational decision-making, regardless of the woman's prior knowledge or awareness, or whether her review of such information is deemed medically inadvisable. Finally, the informed consent provision reflects the efforts of the General Assembly to skew a woman's choice in favor of childbirth, and thus, does not withstand constitutional scrutiny.

Section 3206, the parental consent or consent substitute provision, unconstitutionally fails to afford sufficient protection to the right of an unemancipated minor to procure an abortion. By mandating that a parent be provided with inflammatory materials and biased information devoid of medical relevance, Section 3206 attempts to persuade parents to irrationally withhold consent to an abortion. The procedural mechanism available to a minor for obtaining judicial consent in lieu of parental consent is also constitutionally defective, in that it fails to maintain essential confidentiality, and permits an individual untrained in reproductive health to override the physician's professional judgment, on the basis of an overbroad standard of "usefulness."

The Pennsylvania standard-of-care provision for post-viability abortions, requiring as it does use of the method most likely to result in fetal survival, unless that method would significantly increase the risk to maternal life or health, unconstitutionally elevates fetal life over maternal health and may require a woman to endure increased personal risk for the sake of the fetus. Similarly, the requirement that, *in all cases*, the attending physician secure the attendance of a second physician with responsibility solely to the fetus, at the risk of criminal sanction, is constitutionally deficient, given its failure to allow for emergency situations.

Introduction

In 1973, this Court definitively announced that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. *Roe v. Wade*, 410 U.S. 113, *Reh. Den.* 410 U.S. 959 (1973). As with other fundamental rights, however, the right of a woman to elect to undergo an abortion is not unqualified. Rather, in recognition of a State's legitimate interest in the health of a woman, and in the potential life represented by the fetus, this Court has permitted states to impose carefully tailored restrictions, designed solely to advance those particular state interests, on the procurement of an abortion. *See, e.g., Simopoulos v. Virginia*, 462 U.S. 506 (1983) (Requirement that all second-trimester abortions be performed in hospital or out-patient clinic upheld); *Planned Parenthood Association of Kansas City, MO v. Ashcroft*, 462 U.S. 476 (1983). (Requirement that a pathology report be prepared for each abortion performed upheld.)

In promulgating the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Sections 3201 *et seq.* (hereafter, the Act), the Pennsylvania Legislature greatly exceeded the permissible constitutional parameters of abortion legislation, and legitimate state interest established by the decisions of this Court. Thus, *amicus curiae* maintains, the Court of Appeals for the Third Circuit properly invalidated those provisions of the Act imposing an "informed consent" requirement, 18 Pa. Cons. Stat. Sections 3205 and 3208, those provisions regulating the performance of abortions after viability, 18 Pa. Cons. Stat. Sections 3210(b) and (c), and those mandating the compilation and filing of detailed reports, 18 Pa. Cons. Stat. Sections 3211(a) and 3214. In addition, *amicus curiae* contends, the Court of Appeals properly enjoined the enforcement of the parental consent provision, 18 Pa. Cons. Stat. Section 3206.

ARGUMENT

I. The Court of Appeals for the Third Circuit properly invalidated the Act's informed consent provisions, given that they impermissibly require that (1) a *physician* relate certain information to each woman considering abortion, and (2) that information outside the scope of medical expertise and designed to promote, in a non-neutral fashion, the Commonwealth's policy preference for childbirth over abortion be presented; these requirements unduly interfere with the physician-patient relationship and impermissibly influence a woman's choice between abortion and childbirth.

In 1976 this Court acknowledged the validity of a Missouri statute requiring that an attending physician obtain the informed consent of a woman, in writing, prior to performing an abortion. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). As this Court reasoned,

> The decision to abort . . . is an important and often a stressful one, and it is desirable that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the state to the extent of requiring her prior written consent. *Id.*, at 67.

Although the statute at issue in *Danforth* did not specifically define "informed consent", this Court did define it, as information indicating "just what would be done and . . . [the] consequences." *Id.* at 67, N. 8. As the *Danforth* Court explained, "to ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable strait-jacket in the practice of his profession." *Id.* Thus, states legitimately may seek to insure that the decision to abort has been made "in the light of all attendant circumstances—pyschological and emotional as well as

physical—that might be relevant to the well being of the patient." *Colautti v. Franklin*, 439 U.S. 379, 394 (1979). States may also express a policy preference for childbirth. Statutes and Regulations, however, which unreasonably place "obstacles in the path of the doctor upon whom the woman is entitled to rely for advice in connection with her decision," *Whalen v. Roe*, 429 U.S. 589, 604 N. 33 (1977), or which are designed to influence a woman's informed choice between abortion or childbirth, are constitutionally impermissible. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443-444 (1983).

Pennsylvania's Abortion Control Act conditions a physician's performance or inducement of an abortion on a woman's written voluntary and informed consent. 18 Pa. Cons. Stat. Section 3205. A woman's consent will not, however, be deemed voluntary and informed unless she is provided with information addressed to eight specific areas. The Act's informed consent provisions do much more than require that a woman be told what is to be done and the consequences as mandated by *Danforth*. Rather, by requiring that a *physician* relate certain information to each woman considering abortion, and by mandating that other information outside the scope of medical expertise and clearly designed to promote, in a non-neutral fashion, the Commonwealth's policy preference for child-birth over abortion, be presented, the Act attempts to extend Pennsylvania's interest in ensuring informed medical consent beyond the constitutional limits of consent and into the area of influence.

Section 3205(a)(1) requires that a woman be made aware of (1) the name of the physician who will perform the abortion; (2) the possibility of detrimental physical and psychological effects, not accurately foreseeable at present; (3) the medical risks associated with the particular abortion procedure chosen for her, including,

when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility; (4) the probable gestational age of the "unborn child" at the time for which the abortion is scheduled, and (5) the medical risks associated with carrying the "child" to term. In addition, the class of individuals legislatively approved as the source of the information referred to above is restricted; Section 3205(a)(1) explicitly states that, "the physician who is to perform the abortion or [the referring physician], but not the agent or representative of either," convey this information.[1]

This Court recently invalidated a similar "physician only" requirement. *City of Akron, supra.* Conceding the invalidity of such a requirement, appellants focus on the Act's severability clause.[2] Thus, appellants conclude, the "physician only" requirement, though objectionable, is severable and may be removed. Appellants argue that if modified to remove the physician only requirement, Section 3205(a)(1) is constitutional. *Amicus curiae* strongly disagrees.

The legislative scheme governing informed consent to an abortion in Pennsylvania clearly reflects the intent of the General Assembly that the operating or referring physician be the individual from whom a woman considering pregnancy termination receives the requisite information. Section 3205(a)(1) unequivocally seeks to guarantee that a woman receives this information from the physician who is to perform the abortion or the referring physician, *and no one else*; failure to provide the information subjects a physician to suspension or

[1] Section 3205 also mandates that a woman be provided with this information "at least 24 hours before the abortion." Appellants concede the invalidity of such a requirement: this provision is not at issue in the instant appeal.

[2] Section 5 of Act 1982, June 11, P.L. 476, No. 138, provides that the provisions of the Pennsylvania Abortion Control Act "shall be severable."

revocation of his license. Section 3205(c). As this Court has observed, the starting point in interpreting a statute is the language of the statute itself; absent a clearly expressed legislative intent to the contrary, statutory language must ordinarily be regarded as conclusive. *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155 (1981); *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102 (1980). Here, the legislative will that a treating or referring physician "inform" a woman contemplating abortion of the name of the attending physician, the attendant risks, and the status of the fetus, finds clear expression in Section 3205(a)(1). Thus, the Court of Appeals for the Third Circuit properly concluded that excision of the admittedly unconstitutional language from Section 3205(a)(1) would not advance the goal of the Pennsylvania General Assembly but, rather, would impede it.

This conclusion is strengthened, *amicus curiae* contends, by consideration of Section 3205 in its entirety. *See United States v. Morton,* _____ U.S. _____, 104 S. Ct. 2769, *Reh. Den.* _____ U.S. _____, 105 S. Ct. 27 (1984); *Kokoszka v. Belford,* 417 U.S. 642, *Reh. Den.* 419 U.S. 886 (1974). (Statutory phrases are not to be construed in isolation, but are to be viewed in light of the entire statute.) The two principal components of the Pennsylvania informed consent requirement, Sections 3205(a)(1) and (2), received dissimilar treatment at the hands of the Legislature. While Section 3205(a)(1) requires the information detailed therein to be disseminated by the attending or referring physician, Section 3205(a)(2) expressly permits the physician or an agent of the physician to apprise the woman of other information deemed legislatively relevant to her decision. Although appellants contend that this differentiation suggests that the Pennsylvania Legislature did not view the identity of the source of information as critical, the statutory language itself undermines appellants' position. Where the Legislature selects and includes

particular language in one part of the statute but omits it in another section of the same act, it is generally presumed that the Legislature acted intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, _____ U.S. _____, 104 S.Ct. 296 (1983). Simply stated, the Legislature's use of different language in statutory provisions addressed to the same subject-matter does not reasonably warrant the conclusion that the Legislature was unconcerned with whether different conduct was thereby prescribed. By placing "physician-only" language in Section 3205(a)(1) and "physician or agent" language in 3205(a)(2) it must be concluded that the Legislature intended that physicians and physicians only must provide the information required by 3205(a)(1). *Cf., City of Akron, supra.* (Pervasive "physician only" requirement of abortion statute's informed consent provision is indicative of legislature's concern that similar treatment be given to all classes of information.)

Appellants persist, however, contending that the Pennsylvania Legislature would have preferred a requirement that the information referenced in Section 3205(a)(1) be provided by a physician *or his agent*, to the absence of any requirement that the information be conveyed at all—the result of a finding of nonseverability. *Amicus curiae* strongly urges this Court, however, to decline appellants' invitation to engage in such speculation. The Pennsylvania General Assembly made the impermissible "physician only" requirement an integral part of Section 3205(a)(1). Thus, the Court of Appeals properly rejected appellants' claim of severability.

Similarly, Section 3205(a)(2) of the Act impermissibly infringes upon the role of a physician or counselor, thinly concealing an attempt to advance the Commonwealth's preference for childbirth by persuading pregnant women

to pursue this alternative.[3] Section 3205(a)(2) requires a physician or his agent to advise each woman desirous of terminating her pregnancy of the potential availability of medical assistance benefits for prenatal care, childbirth, and neonatal care, and of the father's liability to support the child. 18 Pa. Cons. Stat. Sections 3205(a)(2)(i) and (ii). Clearly, a requirement that such information be provided goes far beyond the informed consent provision approved in *Danforth, supra*, as well as the concept of informed consent as defined by the Pennsylvania Legislature within the context of medical practice and procedures. As the Pennsylvania Health Care Services Malpractice Act indicates, a patient's consent will be considered informed when she has been made aware of "the nature of the proposed procedure or treatment and of the risks and alternatives to treatment or diagnosis that a reasonable patient would consider material to the decision whether or not to undergo treatment or diagnosis." 40 P.S. Section 1301.101. The obligation to discuss *medical* risks and alternatives with a patient is qualified, however; a physician is relieved of professional liability for failing to furnish such information if it would have had a serious adverse effect on the patient or on the therapeutic process to the material detriment of the patient's health. *Id.*

Courts in several jurisdictions have concluded that "informed consent" as defined for medical practice and procedure purposes should also be the standard used in the abortion context. As the Court observed in *Women's Medical Center of Providence, Inc. v. Roberts*, 530 F.Supp. 1136 (D.R.I., 1982), there is no *medical* justification for differentiating between abortions and other surgical procedures; requiring disclosure of even all medical risks would constitute a substantial interference in the doctor-patient relationship. *Id.*, at 1152.

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[3] An appellate court can affirm on any basis, regardless of whether that reason was advanced by the court whose decision is reviewed. *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970).

If a requirement that, notwithstanding the medical advisability, a woman be apprised of all medical risks attendant to a procedure, cannot be justified, nor can a requirement that non-medically related information be conveyed in the context of abortion solely as a medical procedure. Indeed, in *Freiman v. Ashcroft*, 584 F.2d 247 (8th Cir. 1978), aff'd 400 U.S. 941 (1979), the Court of Appeals for the Eighth Circuit rejected a requirement that a physician advise a woman that she would have no legal rights in a child born during an attempted non-therapeutic abortion. As the appellate court remarked,

> "[T]he Supreme Court did not hold that a state may require a physician to provide to each patient any and all information required by the state, regardless of its legality, constitutionality or medical advisability. . . . [A]lthough requiring the physician to tell his patient what will be done to accomplish the abortion and what the consequences will be assists the patient in being able to give an informed consent, the requirement that the physician tell his patient [that she will have no rights in a child resulting from the attempted abortion] is not reasonably related to the purpose of informed consent. . . *The result of a physician's warning would be to inject into the decision-making process between physician and patient a factor which is irrelevant and extraneous to the medical services being rendered.*" (Emphasis added)

584 F.2d at 251.[4]

Also addressing the disparity in standards of informed consent for abortion and all other medical procedures, the Court of Appeals for the First Circuit noted that a description of "the availability of alternatives to abortion" had no direct bearing on any medically relevant factor, and thus, did not fit within the

[4] Although the statute reviewed in *Freiman, supra*, required the attending physician to inform the woman of the legal implications of her decision, the instant statute permits the delegation of this responsibility. This distinction is not, however, dispositive, given the analysis here presented.

traditional ambit of informed consent, confined to the disclosure of matters within the physician's special knowledge or expertise. *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981). As the Court then remarked,

> [T]hat traditional understanding has been derived from the role played by informed consent as a malpractice litigation doctrine, a context in which doctors are individually held responsible for the dispensation of certain information and in which it makes eminent sense to limit their obligation to matters within their special competence. Here, by contrast, no concern for physician liability is present; the sole question is whether the information would serve to make a woman better informed or not.

Id., at 1020.

Unlike the Massachusetts provision scrutinized in *Planned Parenthood League of Mass. v. Bellotti, supra*, Section 3205 of the Pennsylvania Abortion Control Act expressly states that a physician who violates its provisions "is guilty of 'unprofessional conduct' and his license for the practice of medicine and surgery shall be subject to suspension or revocation." 18 Pa. Cons. Stat. Section 3205(c). Similarly, the failure of any other individual to provide a woman with the requisite information subjects him or her to criminal sanctions. As such, it makes "eminent sense to limit [the physician's and his agent's] obligation to matters within their special competence"—the rendition of medical information and services.

The information required by Section 3205(a)(2) exceeds the traditional obligation to discuss medical risks, and interposes alternatives to abortions. The Act's required recitation of financial assistance and parental support liability information, Section 3205(a)(2)(i) and (ii), injects into the decision-making process factors unrelated to the rendition of medical services or medical risks associated

with abortion. Under the guise of informed consent as a mandate of good medical care, the Act is trying to disseminate information which is not relevant to informed medical consent, and thus, which advances no legitimate State interest. Moreover, compliance may well prompt questions whose answers lie outside the realm of medical expertise and outside the ambit of physical or psychological factors related to abortion. As such, these components of the informed consent provisions can only be viewed as additional, unwarranted burdens on a woman's decision, and thus, attempts to influence the decision itself; these requirements lie outside of legitimate state interests and, consequently, intrude upon a woman's right to a personal and uninfluenced choice to undergo an abortion.

Section 3205(a)(2)(iii) provides an even clearer illustration of the Commonwealth's impermissible efforts to convince pregnant women to choose childbirth over abortion. Pursuant to Section 3205(a)(2)(iii), a woman seeking an abortion must be informed of her right to review certain printed materials that describe the "unborn child" and list agencies which offer alternatives to abortion. Significantly, the Act describes these printed materials in Section 3208, which section is incorporated by reference into Section 3205(a)(2)(iii). Section 3208 requires that the materials include the following statement:

> There are many public and private agencies willing and able to help you carry your child term, and to assist you and your child after your child is born, whether you chose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion.

18 Pa. Cons. Stat. Section 3208(a)(1).

Section 3208 further mandates that a woman be provided with an opportunity to review, if she so desires,

> . . . materials designed to inform the woman of the probable anatomical and physical characteristics of the unborn child at two week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival.

18 Pa. Cons. Stat. Section 3208(a)(2).

Numerous flaws are readily discernable here. The materials available for review must contain a statement, attributable to the Commonwealth, urging a woman to contact certain agencies prior to finalizing her decision. Clearer evidence of the Commonwealth's efforts to dissuade a woman from pregnancy termination is not often found. In fact, Section 3205(a)(2)(iii) describes these agencies as "alternatives to abortion". Moreover, Section 3208's repeated references in required information to the fetus as an "unborn child" and, in particular, the requirement that the materials contain a statement by the Commonwealth describing the fetus as a "child" evidence the Commonwealth's impermissible efforts to skew a woman's decision in favor of childbirth. Since the fetus is not a person, *Roe v. Wade*, 410 U.S. at 156-158, neither is it a "child". *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, *Gerstein v. Poe*, 428 U.S. 901 (1976). Thus, a state may not require that women electing pregnancy termination be told, in effect, that the fetus is a child, since to do so improperly influences choice by state action; *Roe* prohibits promotion of one theory of when life begins, to justify abortions. *Accord*, *City of Akron*, *supra*. (Requirement that patient be told that "the unborn child is a human life from the moment of conception" invalidated.)

Furthermore, although Section 3208 requires that materials detailing the probable anatomical and physiological characteristics of the "unborn child" at two-week gestational increments from fertilization to full-term "be objective, non-judgmental and designed to convey only accurate information about the unborn child

at the various gestational ages," this statutory scheme nonetheless prejudicially impacts on a woman's decision, for several reasons. First, information as to the fetus' physiological characteristics is not directly related to any medically relevant fact *vis-a-vis* the woman, and thus does not advance the need for accurate medical information of risks associated with abortion that defines the limits of informed consent. Rather, as the record reveals, receipt of this information may cause many women seeking abortions emotional distress, anxiety or fear; clearly, it is the impact on women in this stressful situation, rather than on detached readers, against which the information must be measured. (Stipulation of facts, §§109 and 110). Moreover, such effects may be magnified in certain classes of appellees' patients for whom the abortion decision may be inherently more stressful, *e.g.*, those who suffer from such diseases or conditions as diabetes, kidney disease, hemorrhaging or sickle cell anemia, and to whom carrying a pregnancy to term would seriously endanger life or health. (Stipulation of facts, §44.) Lastly, the descriptions required to be made available to a woman encompass all stages of fetal development "at two-week gestational increments from fertilization to full term," rather than merely at the time at which a particular woman seeks an abortion. Thus, Section 3202 mandates that a woman be provided with the opportunity to review clearly irrelevant and potentially misleading information, unrelated to the time at which consent is given by viewing fetal development beyond the point of her own pregnancy.

These aspects of the Pennsylvania Abortion Control Act's informed consent provisions embody, *amicus curiae* maintains, an enforced and, in many instances, medically contraindicated state lecture. Consideration of the factors noted above suggests that the primary import, and indeed the primary purpose, of the required information is not so much factual as it is moral. It is unrelated to maternal medical health but related to the

effort to influence decisions on abortion. See 18 Pa. Cons. Stat. Section 3202(c). To the extent that the state may require that information be made available, it must be neutral and objective; coercive state indoctrination of particular values or ethical judgments is objectionable to First as well as Fourteenth Amendment principles. *Amicus curiae* recognizes that implementation of Section 3208 may not result in descriptions as blatantly offensive as those previously deemed unconstitutional. *See e.g., City of Akron, supra* (Requirement that woman be provided with description of fetal characteristics including appearance, mobility, tactile sensitivity, and brain and heart function, invalidated.) The burdens described above however, flow from the very fact that women desirous of further education regarding abortion alternatives will be subjected to prescribed fetal descriptions; the failure to serve any state interest is equally true of all such descriptions. *Amicus curiae* thus urges this Court to conclude that the only appropriate judicial response to such descriptions is to prohibit them all together.

Appellants argue that the requirement that a woman be made aware of the existence of the Section 3208 materials does not skew her decision, because such a skewing effect can only be produced by the nature of the information provided if she chooses to make use of such materials. Appellants, however, discount the fact that affirmative action is required by the physician or his agent, who must orally advise the patient that materials describing the fetus at various gestational ages and listing agencies which offer alternatives to abortion have been prepared by the Department of Health, and where they may be obtained. To say that the mandate of the statute merely ensures that the materials are available is illusory. The mandated discussion of the availability of materials and the mere discussion of the nature and content of the materials is coercive to freedom of choice since it must entail a description of constitutionally impermissible information. In many cases, depending on

the curiousity of the patient, once informed of the existence of these materials and their basic content, a physician or counselor may feel compelled to offer an evaluation or may be forced to answer any resultant questions, thereby further influencing freedom of choice. For example, if told that the materials describe the "unborn child" a woman may inquire into the nature of the description presented. To answer her question, the physician or counselor must tell her that the materials describe the probable anatomical and physiological characteristics of the "unborn child" at two-week gestational intervals, and discuss the possibility of fetal survival at any given point. As a result, the physician or counselor has directly provided the patient with clearly irrelevant, and perhaps, medically inadvisable, information. Similarly, in response to a patient's inquiry regarding the materials addressed to abortion alternatives, the physician or counselor would be compelled to advise the patient that the materials catalog private and public agencies offering financial assistance and the placement of children through adoption. Thus, a physician or counselor by notifying a woman of the existence and availability of constitutionally impermissible material cannot play a passive role in administering this requirement—that would be inconsistent with his or her professional responsibility.

The egregiousness of Section 3205(a)(2), in practical effect, is underscored by the fact that it preys on the trusting relationship between a woman and the physician or counselor to whom she turns during this stressful and vulnerable period. Although this Court has often emphasized the central role of physicians in the abortion decision, *City of Akron, supra; Colautti v. Franklin, supra*, Section 3205(a)(2) effectively converts the physician or counselor into a spokesperson for the Commonwealth, promoting the Commonwealth's biased

viewpoint, regardless of whether abortion would effectuate the preferred medical judgment in any given case.

Invalidation of Section 3205 will not subvert the Legislature's legitimate policy choice that a woman's decision to terminate her pregnancy be informed. As the record reveals, appellee agencies and physicians encourage adult women to participate in options counseling, and require minors to do so, prior to finalizing their decisions regarding their pregnancies (Stipulation of Facts, §§11, 17, 24 and 95), and require all women desirous of terminating their pregnancies to undergo counseling prior to submitting to an abortion (Stipulation of facts, §§14, 31 and 40). As such, trained professionals and paraprofessionals advise pregnant women of the relative *medical* risks involved and encourage them to discuss their views on, and reservations concerning, abortions (Stipulation of facts, §§13, 20, 21, 22, 31, 38-39). Counselors are alert for women who are hesitant or ambivalent about the abortion decision; women who exhibit such hesitancy or ambivalence are provided with additional counseling, and in some cases, rescheduled for the procedure at a later date.

Thus, a woman who prefers to carry out her pregnancy to term or who is ambivalent or hesitant about which option to pursue can be made aware of the types of services reflected in the available materials, and be afforded an opportunity to review them, if desired. But, a *requirement* that *every* woman be told of the availability for review of materials dealing with alternatives to abortion and describing fetal physiology in detail and which, if described, would expose her to the Commonwealth's strong recommendation urging her to contact financial assistance and adoption agencies, and thus, in effect change her mind, is impermissible. Women who choose the abortion alternative can reasonably be presumed to know that the alternative to abortion is childbirth; it is this knowledge that impels them to seek an abortion in the first place. Similarly, women who elect

to terminate their pregnancies are aware of the procedure's central consequence: the adequacy of a woman's knowledge need not be and should not be gauged solely by the information imparted by a physician or counselor. Insofar as Sections 3205(a)(2) and 3208 require that medically irrelevant information be made available in an unsettling form, they effectuate a blatant intrusion into the decision making process, as the state attempts to influence the ultimate decision. Accordingly, the Court of Appeals for the Third Circuit properly invalidated Sections 3205(a)(2) and 3208.

II. The Pennsylvania Abortion Control Act's "substitute consent" provision impermissibly requires that a parent or guardian be presented with inflammatory information and materials irrelevant to a determination of a minor's best medical interest. Similarly, the procedural rules adopted to implement this provision fail to ensure that consideration be given only to factors medically related to the abortion decision, and that anonymity is maintained. Thus, the Act fails to adequately protect the constitutional right of an unemancipated woman to obtain an abortion.

Section 3206 of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Section 3206, and the procedural rules adopted to supplement it, suffer from many of the constitutional infirmities discussed in the context of the informed consent provision, 18 Pa. Cons. Stat. Section 3205. In addition, the procedural rules fail to ensure that an unemancipated minor is afforded the privacy and confidentiality constitutionally required. Thus, *amicus curiae* strongly urges this Court to invalidate Section 3206, and to reject Pennsylvania Orphans' Court Rule 16.[8]

[8] *Amicus Curiae* recognizes that no cross-appeal has been filed from that part of the Court of Appeals' decision sustaining, on its face, the validity of Section 3206. Given, however, that a finding by this Court that Section 3206 is unconstitutional would have the same practical effect as the Court of Appeals' decision to enjoin operation of Section 3206, *amicus* respectfully requests this Court to review both Section 3206 and the procedural rules adopted by the Pennsylvania Supreme Court, subsequent to the Court of Appeals' decision in this case.

In *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion), this Court acknowledged the qualitative difference between the abortion decision and other decisions a young woman may be called upon to make during her minority:

> The need to preserve the constitutional right and the unique nature of the abortion decision ... require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Id., at 642. While a State's interest in protecting immature minors will, then, sustain a requirement of a "consent substitute", *e.g.* a parent, the State must also establish an alternate confidential procedure whereby an unemancipated minor will have the opportunity to fairly demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests. *City of Akron*, *supra*, at _____; *Bellotti v. Baird*, *supra*, at 643-644.

A "consent substitute" may not, however, be presented with biased and irrelevant information to which the pregnant woman herself may not constitutionally be exposed, *amicus* maintains—otherwise the "substitute" is not really a substitute. Although a parent, for example, is less directly affected by the abortion decision than is the young woman herself, a state may determine that the decision's effect on family stability and the parental role in child-rearing justify parental intervention. *Bellotti v. Baird*, *supra*. A state is thus permitted to conclude, implicitly, that, apart from the physical aspect, the abortion decision impacts as greatly on the minor woman's family as it does on her. Concomitantly *amicus curiae* contends, it may not constitutionally be said that the abortion decision impacts *more* on the woman's family than on the pregnant woman. As such, factors constitutionally irrelevant to the abortion decision if left

solely to the pregnant minor are also constitutionally irrelevant to any decision made by a "consent substitute."

Section 3206(a) of the Pennsylvania Abortion Control Act requires that, where an unemancipated minor seeks parental consent to an abortion, the parent must be provided with "the information *and materials specified in Section 3205.*" (Emphasis added). Significantly, Section 3206(a)'s reference to Section 3205 is not limited to Section 3205(a)(i), *i.e.*, the medical risks to treatment. Rather, Section 3206 refers to Section 3205 in its entirety, thereby encompassing Section 3205(a)(2), and the Section 3208 materials. Moreover, while amicus has argued that, in effect, Section 3205(a)(2) guarantees that a woman be told of the nature and basic content of the materials mandated by Section 3208, Section 3206(a) *expressly* requires that the parent be provided with these irrelevant and highly inflammatory materials *themselves.* Thus, while a pregnant woman herself may elect to forego review of the actual materials as prepared by the Department of Health, the physician may not afford the parent a similar option.

In addition, although Section 3205 permits the provision of at least some of the information legislatively deemed necessary to informed consent by the physician or his agent, Section 3206 requires a *physician* to provide the parent with the information *and materials* detailed in Sections 3205 and 3208.

The *requirement* that the parent whose consent to an abortion upon a minor woman is sought, be provided with biased information, irrelevant to the medical abortion decision and which a state may not require to be provided to the pregnant woman herself, must be characterized as a blatant effort by the Commonwealth to influence the decision.

An unemancipated woman may choose, for whatever reason, not to seek parental consent to an abortion. In such cases, resort may be made to the judiciary. Section

3206(c) authorizes the filing of a petition to the Court of Common Pleas in the county in which the woman resides or in which the abortion is sought. Section 3206(c) further directs that an "appropriate" hearing be held, after which the Court, upon a finding that the woman is mature and capable of consenting to the abortion, and has consented, must authorize the performance of an abortion. If, however, the Court finds that the woman is incapable of giving informed consent, or the women does not claim to be sufficiently mature, the Court must determine whether the abortion would serve the woman's best interests, and if so, must authorize the procedure. 18 Pa. Cons. Stat. Section 3206(d).

Section 3206(d) thus requires the Pennsylvania judiciary to intrude into the realm of medical advisability and decision-making traditionally restricted to those individuals licensed to practice medicine in this Commonwealth. Regardless of the decision eventually reached, Section 3206(d) requires a judge, in prescribed circumstances, to independently assess the determination of medical necessity already made by the minor woman's own physician and to perhaps second-guess a medical decision of the person best educated and informed to make such decisions. *See* 18 Pa. Cons. Stat. Section 3204 (No abortion shall be performed but upon a finding that the procedure is necessary.) Although this Court has often acknowledged the pivotal role played by the physician in the abortion decision, *See, e.g., Colautti v. Franklin, supra,* Section 3206(d) permits an individual untrained in medicine to discount, or even reject, the physician's best professional judgment, in his effort to ascertain the minor's "best interests"—a concept incapable of precise definition and whose use in the context of restricting a minor's exercise of a unique, fundamental right is impermissible.

The procedural rules adopted to implement Section 3206 do not cure its deficiencies but, rather, add to them. Noteworthy here is Pennsylvania Orphans' Court Rule

16.5. Rule 16.5 directs the Court, at a hearing held pursuant to Section 3206(c), to hear evidence related to the young woman's emotional development, maturity, intellect and understanding, her pregnancy, possible consequences and alternatives to the abortion, and "any other evidence that the Court may find useful" to its determination. Significantly, the Court's solicitation of additional "useful" information is not limited to relevant physical or psychological factors impacting on the decision. Rather, under the aegis of "usefulness", a court conceivably could consider, for example, parental objections based on religious views.[6] While this Court has approved a prohibition of consideration of parental objections, *Bellotti v. Baird, supra*, at 644, neither Section 3206 nor the rules designed to implement it contain such a prohibition.

Finally, while Section 3206 pays lip-service to the confidentiality requirement enunciated in *Bellotti v. Baird, supra*, 18 Pa. Cons. Stat. Section 3206(f), the procedures implemented by the Pennsylvania Supreme Court are woefully inadequate for the preservation of a young woman's privacy. All petitions seeking authorization for an abortion must include the minor's initials, the name and addresses of her parents, and her signature. Pennsylvania Orphans' Court Rules 16.2(a)(1)(3) and (7). While anonymity may be preserved by the use of a minor's initials on the petition, *Planned Parenthood, Kansas City, Mo. v. Ashcroft*, at n. 16, the required inclusion of names and addresses of parents, and of the minor's own signature, nullifies efforts to protect her identity.

Furthermore, while the Act permits an unemancipated minor to seek judicial authorization of an abortion without consulting with her parent, 18 Pa. Cons. Stat. Section 3206(c), Rule 16.4 states, in part:

> All persons shall be excluded from the hearings *except* the applicant, *her parents or persons standing in loco parentis*, and such other person's whose presence is specifically requested by the applicant or her guardian.

[6] As discussed further below, a parent may not be excluded from a Section 3206(c) hearing.

Pennsylvania Orphans' Court Rule 16.4 (emphasis added). Thus, even if a minor elects not to inform her parents of her pregnancy, one or both may, upon so learning through whatever means, attend the hearing, notwithstanding any objections voiced by their daughter. In addition, the Court could conceivably deem "useful" any comments that the parent or parents might wish to make.

A parent may not be given a veto power over the decision of an unemancipated daughter to terminate her pregnancy. *Danforth, supra*. While on its face Section 3206 does not conflict with this constitutional principle, the rules adopted to implement the statute achieve the same effect by (1) permitting parental attendance, even where the minor has chosen not to notify her parents of her decision, and (2) failing to prohibit the solicitation of parental comments regarding the decision if deemed "useful". As Sections 3206 and Orphans' Court Rule 16 thus inadequately preserve a minor's fundamental, albeit limited, right to an abortion, *amicus curiae* urges this Honorable Court to invalidate Section 3206, and to reject Pennsylvania Orphans' Court Rule 16.

III. The Court of Appeals for the Third Circuit properly invalidated Section 3210(b), given that a woman may not constitutionally be required to bear an increased medical risk in order to preserve the life of a viable fetus.

Any abortion currently performed in Pennsylvania upon a viable fetus must be performed in the manner most likely to result in fetal survival "unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman." 18 Pa. Cons. Stat. Section 3210(b). This requirement, *amicus*

curiae maintains, impermissibly places priority on the life of the fetus over the health of a pregnant woman, and thus, was properly invalidated.

In 1979, this Court struck down the prior standard-of-care provision applicable to post-viability abortions in Pennsylvania. *Colautti v. Franklin, supra.* Requiring that a physician employ the abortion technique most likely to result in a live birth "so long as a different technique would not be necessary in order to preserve the life or health of the mother," the earlier statute was invalidated on the basis of its inherent ambiguity. As the court remarked,

> [It] is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount or his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and . . . fetal survival. Serious ethical and constitutional difficulties . . . lurk behind this ambiguity.

Id., at 400.

The constitutional difficulties alluded to by the *Colautti* Court stem, *amicus curiae* maintains, from the conclusion implicit in *Roe v. Wade, supra:* even post-viability, a woman may not be forced to endure an increased health risk, for the sake of the fetus. The instant statutory scheme, however, imposes such a requirement, and thus, is unconstitutional.

Section 3210(b) requires a physician to determine prior to aborting a viable fetus, which of the available methods or techniques will present the best chance for fetal survival. Use of that particular method is then statutorily prescribed, except in those instances where its use would pose a "significantly greater" medical risk to the life or health of the mother than would another available method. The phrase "significantly greater" thus presumes that there may be abortion methods for use post-viability which will increase the risk to maternal

health, but whose use will not rise to the level of a "significantly greater" medical risk. To illustrate: There may be five abortion techniques available, two of which are unsuitable for post-viability abortions, given the advanced state of the pregnancy. The remaining three methods may present varying degrees of medical risk to the woman. If none of the available methods would present a "significantly greater" health risk to the woman, the physician must, under threat of criminal sanction, choose from the three available methods the one most likely to preserve fetal life or health, notwithstanding the availability of an alternate method which would present less risk to the pregnant woman. Thus, the method best calculated to save the fetus may not be the method of least medical risk to the woman. Although the Constitution does not permit a requirement that an abortion be performed by other than the method of least risk to the woman, Section 3210(b) of the Pennsylvania Abortion Control Act imposes such a requirement, and thus is unconstitutional.

The prominent place reserved to fetal life by the Act is further evidenced by the fact that, in assessing the risk presented by any given pregnancy termination procedure, the woman's physician specifically may not consider the potential psychological or emotional impact on the woman of fetal survival. Although this Court has required that a physician consider factors other than physical health in determining whether an abortion is necessary, *Doe v. Bolton,* 410 U.S. 179, *reh. denied,* 410 U.S. 979 (1973); *United States v. Vuitch,* 402 U.S. 62 (1971), and indeed, the Pennsylvania statute expressly so provides, 18 Pa. Cons. Stat. Section 3204, consideration of emotional, psychological and familial aspects is suspended when the physician decides upon the appropriate method of abortion, post-viability. Section 3210(b) is thus analogous to the Nebraska requirement that a post-viability abortion be performed in a manner compatible with protecting the woman from "an

imminent peril that substantially endangers her life or health" invalidated in *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981). Recognizing that a state may regulate post-viability abortions, the District Court nonetheless invalidated Nebraska Criminal Code Section 28-330, noting that the legislature's inclusion of the qualifying language rendered Section 28-330 unconstitutionally underinclusive. *See also Margaret S. v. Edward*, 488 F. Supp. 181 (E.D. La. 1980) (Louisiana statute permitting post-viability abortions only if necessary to prevent "permanent impairment" of a woman's health deemed unconstitutional.)

Similarly, Section 3210(b) impermissibly interferes with medical judgments by dictating a particular course of action, even when, in the physician's judgment, a different course should be taken to protect the woman from an increased health risk. This course of action a state has no authority to require. Consequently, the judgment of the Court of Appeals for the Third Circuit invalidating Section 3210(b) should be affirmed.

IV. The Court of Appeals for the Third Circuit properly invalidated the Act's "second-physician" requirement, given the absence of an exception for emergencies.

As noted above, the Pennsylvania statutory scheme requires physicians who perform abortions on fetuses determined to be viable to employ the abortion technique most likely to preserve fetal life, provided that use of that technique does not present a significantly greater medical risk to the life or health of the pregnant woman. 18 Pa. Cons. Stat. Section 3210(b). The statute also directs that in such cases, and in any other cases in which the method chosen does not preclude the possibility of fetal survival, the attending physician arrange for the attendance of a second physician. The second physician is required, immediately upon completion of the abortion procedure, to take control of

the child and provide him or her with all medical care reasonably necessary to preserve the child's life and health. 18 Pa. Cons. Stat. Section 3210(c).[7]

In reviewing a similar provision, five members of this Court upheld a second-physician requirement that could be interpreted as containing an exception for emergencies, during which the delay inherent in arranging for the presence of a second physician could adversely affect the pregnant woman's life or health. *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, supra.* Although the statute reviewed in *Ashcroft* did not expressly contain a medical emergency exception, such a construction was permissible, the Court concluded, by virtue of the statutory qualifying language; the second physician was compelled to "take all reasonable steps in keeping with good medical practice . . . to preserve the life or health of the viable unborn child, provided that it [did] not pose an increased risk to the life or health of the woman." *Id.*, _____ U.S. _____, 103 S.Ct. at 2522, n.8.[8]

Section 3210(c) of the Pennsylvania Abortion Control Act is, however, completely devoid of any references to maternal life or health, or to a medical emergency, as statutorily defined. 18 Pa. Cons. Stat. Section 3203. Nor does the statute permit a finding that the Legislature intended the clause in Section 3210(a), which provides a

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[7] The requirement that the attending physician, *in all cases* where the abortion method chosen does not preclude the possibility of a live birth, arrange for the attendance of a second physician, is further evidence that a woman may be required to subject herself to additional health risks apart from those inherent in the abortion decision itself, in the interest of fetal survival.

[8] *Amicus curiae* respectfully suggests that this Court's perception of an "emergency exception" in the Missouri Statute scrutinized in *Ashcroft* was misplaced, in that the above-quoted language referred to the responsibility of the second physician to the *fetus*, and not to the responsibility of the attending physician in arranging for the presence of a second physician.

defense for abortions performed on non-viable fetuses, or necessary to preserve maternal life or health, to be equally applicable to Section 3210(c). While Section 3210(a) states that these circumstances shall be a complete defense to any charge brought against a physician for violating the requirements of *this section*, *amicus curiae* contends that analysis of Section 3210 in its entirety undermines the conclusion that "this section" also refers to Sections 3210(b) and (c). Initially, *amicus curiae* notes that extension of these defenses to Section 3210(b) would be absurd. Section 3210(b) by its terms assumes viability, and thus contains a limited defense peculiar to that particular section: the physician's good faith judgment that use of the method most consistent with preservation of fetal life or health presented a significantly greater medical risk to the life or health of the pregnant woman than did the method actually used. Moreover, the maternal life and health "defense" within Section 3210(b) is itself more narrowly defined than that deemed permissible in the context of prohibiting abortions totally during the last trimester of a pregnancy. Given that the legislature will not be presumed to have intended an absurd result, *United States v. Turkette*, 452 U.S. 576, 580 (1981), the defenses contained within Section 3210(a) cannot be viewed as applicable to Section 3210(b). Appellants' argument that these defenses are similarly applicable to Section 3210(c), relying as it does solely on this expansive concept of the term "section", must thus fail.

Absent more explicit emergency situation language, *amicus* must suggest that the Court of Appeals for the Third Circuit properly invalidated Section 3210(b) of the Pennsylvania Abortion Control Act.

Conclusion

A State has a legitimate interest in the health of a pregnant woman, and in the potential life represented by the fetus. As such, a State may impose carefully-tailored restrictions on the procurement of an abortion, designed to advance these health interests. However, a statutory scheme which (1) requires that information and materials outside the scope of medical expertise and advisability and thus designed solely to promote, in a non-neutral fashion, a policy preference for childbirth over abortion, be presented to a woman desirous of an abortion or her parent, if she is unemancipated; (2) in the interest of preservation of fetal life, requires a woman who elects to terminate her pregnancy after the point of viability to submit to a procedure that does not present the least medical risk to her health, and (3) requires the presence of a second physician, with responsibility solely to the fetus, at *all* abortions performed post viability, exceeds legitimate state concerns, by unduly interfering with the physician-patient relationship and attempting to directly influence the abortion decision. The Pennsylvania Abortion Control Act is such a statutory scheme. Accordingly, *amicus curiae* respectfully urges this Honorable Court to affirm the judgment of the Court of Appeals for the Third Circuit entered in the instant case.

Respectfully submitted,

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Certificate of Service

I, ROBERT T CROTHERS, a member of the Bar of the Supreme Court of the United States, am counsel of record for the National Family Planning and Reproductive Health Association, Inc., *amicus curiae* herein. I hereby certify that on August 30, 1985, pursuant to Rule 28.5(b), Rules of the Supreme Court, I served a copy of the foregoing brief on each of the parties herein, as follows:

On Richard Thornburgh, H. Arnold Muller, Helen B. O'Bannon, Michael J. Browne, William J. Davis, LeRoy S. Zimmerman, and Joseph A. Smyth, Jr., Appellants, by depositing such copy in the United States Post Office, Washington, Pennsylvania, with first class postage prepaid, properly addressed to Andrew S. Gordon, the above-named Appellants, counsel of record, at the Office of the Attorney General, 15th Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

On the American College of Obstetricians and Gynecologists, Pennsylvania Section, Henry H. Fetterman, M.D., Thomas Allen, M.D., Francis L. Hutchins, Jr., M.D., Allen J. Kline, D.O., Brooks R. Susman, Paul Washington, Morgan P. Plant, Elizabeth Blackwell Health Center for Women, Planned Parenthood of Southeastern Pennsylvania, Reproductive Health and Counseling Center, and Women's Health Services, Inc., Appellees herein, by depositing such copy in the United States Post Office, Washington, Pennsylvania, with first class postage prepaid, properly addressed to Thomas E. Zemaitis, the above-named Appellees' counsel of record, at Suite 2001, the Fidelity Building, Philadelphia, Pennsylvania, 19109.

All parties required to be served have been served.

Dated: August 30, 1985

By Robert T. Crothers

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